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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DAVID JOHN ZABRINAS,)	
)	
Petitioner.)	
v.)	Case No. 03-3072-JAR
)	
DAVID McKUNE, et al.)	
)	
Respondents.)	
_____)	

ORDER DENYING MOTION FOR STAY OF PROCEEDINGS

This matter is before the Court on Petitioner David John Zabrinas's Motion for Stay of Proceedings (Doc. 24). Petitioner argues that in the interest of judicial economy, the Court should stay this proceeding pending exhaustion of his post-conviction motion, which he "recently" filed in state court.¹ Petitioner filed this 28 U.S.C. §2254 action on February 10, 2003. According to the petition, on January 28, 1997 the judgment of conviction was entered. Petitioner appealed this conviction and the sentence; the Kansas Court of Appeals affirmed the conviction and sentence on November 24, 1999; and the Kansas Supreme Court denied review in 2000. Petitioner filed a writ of habeas corpus in the state court; the district court denied the petition; the Kansas Court of Appeals affirmed the denial and the Kansas Supreme Court denied review on February 7, 2003.

Defendant objects to a stay, arguing that either petitioner has exhausted his available state remedies, rendering a new post-conviction motion futile; or he has not exhausted his remedies, such that

¹The Court presumes that petitioner means that the post-conviction motion was filed not long before he filed this motion for stay on July 16, 2004.

this §2254 action should be dismissed. The Court is unable to ascertain whether petitioner's recent post-conviction motion is based on new claims for relief, or claims that merely clarify or amplify a claim or theory raised before. Notably, new claims for relief now pursued in a new post-conviction motion filed in state court, will be time barred, should petitioner seek to amend his §2254 petition to add these claims.² If an untimely amendment "by way of additional facts, clarifies or amplifies a claim or theory in the original motion..." the court has discretion to relate such claim back to the date of the original motion, "if and only if the original motion was timely filed and the proposed amendment does not seek to add a new claim or to insert a new theory into the case."³ In light of the limitations period for §2254 petitions, and the limitations on additional or new claims, the Court cannot ascertain whether petitioner's claims raised in the "recently" filed post-conviction motion in state court are claims that can even be considered in this proceeding. Thus, the motion to stay is denied.

IT IS THEREFORE ORDERED that Petitioner's Motion (Doc. 24) for a stay of proceedings is **DENIED**.

Dated this 30th day of August, 2004.

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

²See 28 U.S.C. §2254; 28 U.S.C. §2244(d); Fed.R.Civ.Pro.15(c); *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir.2001), *cert.denied*, 535 U.S. 973 (2002)(new claims time barred by AEDPA's one year statute of limitations).

³*Id.*